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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LARRY C., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and EMMA C., Appellees.	2 CA-JV 2011-0145 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J160183

Honorable Suzanna S. Cuneo, Judge Pro Tempore

AFFIRMED

Sarah Michèle Martin — Tucson
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General
By Claudia Acosta Collings — Tucson
Attorneys for Appellee Arizona Department of Economic Security

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K E L L Y, Judge.

¶1 Appellant Larry C. appeals from the juvenile court's December 2011 order terminating his parental rights to his daughter, Emma C., on grounds of abuse or neglect, disabling mental illness, and failure to remedy circumstances that caused her to remain in court-ordered, out-of-home care for fifteen months or more. *See* A.R.S. § 8-533(B)(2), (3), and (8)(c). Larry argues the evidence was insufficient to sustain any of these statutory grounds for severance or to establish that terminating his parental rights was in Emma's best interests. We affirm.

Background

¶2 Larry's wife, Courtney C., gave birth to Emma in December 2009 and, a month after her birth, the Child Protective Services (CPS) division of the Arizona Department of Economic Security (ADES) received a report that she had been hospitalized and diagnosed with nonorganic failure to thrive.[1] The report further alleged Courtney was not bonding with Emma, who had gained weight at the hospital but then lost weight at home. Emma's pediatrician told a CPS investigator that Courtney had said that she was always tired and not getting enough sleep, that Emma was getting only six to eight ounces of formula a day, and that Emma was always crying. Courtney reported she suffered from epileptic seizures that prevented her from being able to parent her children. She also stated stress aggravated her epilepsy and she did not feel she could handle Emma's crying and the stress it created.

[1]Courtney C.'s parental rights to Emma also have been terminated. She has appealed from the juvenile court's termination order in a separate proceeding.

¶3 During the year before Emma was born, Courtney had regained physical custody of her daughter Hannah F., born in October 2004. Hannah had been raised by her paternal and maternal relatives until she came to live with Courtney and Larry sometime in 2009. According to the CPS investigator, Larry acknowledged he had a criminal history but appeared to be stable, was "attempting to run his own remodeling and landscaping business," and was motivated to keep the family intact. Based on its investigation, CPS took temporary custody of Emma and placed her in foster care, but concluded that Hannah, then five years old, could safely remain in the home. ADES filed a dependency petition as to both children in January 2010.

¶4 By mid-March 2010, Emma, still suffering from significant medical and feeding issues, was placed in a Medically Vulnerable Program at an agency that was able to provide twenty-four-hour nursing care.[2] In April, Hannah became "very upset" after witnessing a domestic violence incident between Larry and Courtney, and CPS removed her from the home and placed her in foster care. While there, Hannah told her foster mother that Larry had "touched her in her private area" and she was having pain there. She also said she did not want to see Larry, was afraid of him, and thought he was "mean." Hannah's therapist and a child sexual abuse specialist found her account credible, and the juvenile court adjudicated Emma dependent as to Larry in May 2010.

¶5 In August 2011, ADES filed a motion to terminate Larry's parental rights to Emma, alleging he had neglected or willfully abused a child, was unable to discharge

[2]Emma eventually was diagnosed with Noonan's Syndrome, a genetic disorder that caused or contributed to her medical issues.

his parental responsibilities because of mental illness, and had been unable to remedy the circumstances that caused Emma to remain in out-of-home care for fifteen months or longer. *See* § 8-533(B)(2), (3), and (8)(c). ADES also alleged that terminating his parental rights was in Emma's best interests. After a five-day, contested termination hearing the juvenile court granted ADES's motion, finding that ADES had proven all of the grounds alleged and that termination was in Emma's best interests. This appeal followed.

Discussion

¶6 On appeal, Larry argues there was insufficient evidence to support the juvenile court's findings of grounds for termination or its finding that termination was in Emma's best interests. To terminate parental rights, the court must find the existence of at least one of the statutory grounds for termination enumerated and "shall also consider the best interests of the child." § 8-533(B). Although statutory grounds for termination must be proven by clear and convincing evidence, only a preponderance of the evidence is required to establish that severance will serve the child's best interests. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm an order terminating parental rights unless we can say as a matter of law that no reasonable person could find the essential elements proven by the applicable evidentiary standard. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶¶ 9-10, 210 P.3d 1263, 1265-66 (App. 2009). We view the evidence in the light most favorable to upholding the court's order, *id.* ¶ 10, and if sufficient evidence supports any one of the statutory grounds relied upon, "we need not address claims pertaining to the

other grounds." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 3, 53 P.3d 203, 205 (App. 2002).

Willful Abuse of a Child, § 8-533(B)(2)

¶7 Larry argues the juvenile court erred in finding ADES had proven its allegation that he had willfully abused or neglected a child or "failed to protect the children from willful abuse or neglect so as to cause a substantial risk of harm to the children's health or welfare." Larry does not dispute that, when he was seventeen and living in Spokane, Washington, he pleaded guilty and was convicted of attempted indecent liberties with a child involving his nine-year-old half sister.[3] In accordance with Washington law, he was evaluated and determined to be a sexual psychopath and referred for treatment.[4] Nine months later, upon a determination that he was "not amenable to treatment as a sexual pyschopath and . . . not safe to be at large," he was sentenced to a five-year prison term. *See* RCW 71.06.091; 1979 Wash. Sess. Laws, ch. 141, § 130; *State v. Daniels*, 31 Wash. App. 234, 239 n.5, 639 P.2d 880, 883 n.5 (1982).

¶8 Nor does Larry dispute that, when he was thirteen, he was accused of sexually abusing his younger step-brother, or that his adult daughter recently alleged that

[3]Citing Larry's age, his prior juvenile record, and the "serious . . . wilfull and aggressive" nature of the offense, the Washington juvenile court declined jurisdiction and transferred the case for adult prosecution.

[4]At the time of Larry's offense, RCW 71.06.010 defined "[s]exual psychopath" as "any person who is affected in a form of psychoneurosis or in a form of psychopathic personality, which form predisposes such person to the commission of sexual offenses in a degree constituting him a menace to the health or safety of others." *State v. Daniels*, 31 Wash. App. 234, 237 n.4, 639 P.2d 880, 882 n.4 (1982); 1977 Wash. Sess. Laws, Ex. Sess., ch. 80, § 42.

Larry had sexually abused her as a child. He denies all of these allegations, including Hannah's, and asserts, "There was no genuine probative evidence presented at trial that [he] is a risk to children for sexual abuse." And, relying on *In re Juvenile No. J-2255*, 126 Ariz. 144, 613 P.2d 304 (1980), Larry contends the juvenile court committed reversible error in terminating his parental rights pursuant to § 8-533(B)(2). We disagree.

¶9 In *Juvenile No. J-2255*, the court construed § 8-533(4), which, in relevant part, had provided for termination when a parent "'is deprived of his civil liberties due to the conviction of a felony if the felony of which such parent was convicted is of such nature as to prove the unfitness of such parent to have future custody and control of the child.'" *Juvenile No. J-2255*, 126 Ariz. at 146, 613 P.2d at 306, *quoting* § 8-533(4) (1974). Noting that the language of this provision "requires the juvenile court to assess the parent's future fitness on the basis of a past act," the court held that proof of a conviction for molestation was sufficient to establish unfitness, but that a "parent may rebut the assessment of unfitness based on a past act by showing actual fitness at the time of the hearing." *Id.* at 147, 613 P.2d at 307.

¶10 Section 8-533(4) is not at issue here, however, and, in contrast to that provision, § 8-533(2) does not require the juvenile court to assess a parent's present or future fitness; rather, it authorizes termination when a parent has been found to have "neglected or wilfully abused a child." Moreover, even assuming, without deciding, that § 8-533(2) also permits a parent to rebut a finding that he had abused a child by establishing that he is now, nonetheless, a fit parent and not subject to termination, Larry has not done so here.

¶11 Larry cites the March 2011 report of his treating psychologist, Dr. Daniel Overbeck, that there was insufficient information for him to form a "specific, confident conclusion regarding the likelihood of a persistent, deviant sexual arousal pattern by Larry . . . that might create risk that he would behave in a sexually inappropriate fashion with a minor child." But at the termination hearing, Overbeck acknowledged that "there is a level of risk" for abuse, based on the multiple allegations against Larry, but that he could not "quantify" the level of risk based on his conversations with alleged victims and Larry's alternative explanations regarding the allegations.

¶12 Larry also relies on a psychophysiological evaluation performed by Dr. Steven R. Gray, who assumed, based on Larry's guilty plea and conviction, that he had touched his half-sister in an inappropriate manner, but expressed "no opinion" with respect to all other allegations, adding, "Nothing in this report should be taken as a statement of whether or not [Larry] is or is not culpable of sexual misconduct" against the minors involved. Two different polygraph examinations, performed as part of this evaluation, also yielded results of "No Opinion." The examiner explained that Larry "had very little response to any of the questions," and she had asked him afterwards "if he had consumed medications or illegal drugs," but he denied doing so. She also noted that Larry had been "falling asleep" during the first examination, but had "appeared appropriately alert" during the second. The inconclusive opinions of Overbeck and Gray, and the inconclusive polygraph results, fall short of the rebuttal evidence contemplated by *Juvenile No. J-2255*. *See id.* at 147, 613 P.2d at 307 (evidence father complied with parole conditions, held a steady job, and remarried insufficient to rebut assessment of

unfitness based on molestation conviction where he never "attempted to seek treatment for the underlying behavioral abnormality").

¶13 Larry also suggests the juvenile court erred in finding he had abused a child based on his 1981 conviction, because it "was so remote in time and place, and based upon a juvenile act." Section 8-533(B)(2) "permits termination of parental rights to a child who has not been abused or neglected, upon proof that the parents abused or neglected another child or permitted another to abuse or neglect another child." *Mario G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 282, ¶ 15, 257 P.3d 1162, 1165 (App. 2011). But in *Mario G.*, this court held that ADES must also prove "a 'constitutional nexus' between the prior abuse and the risk of future abuse to a different child." *Id.* ¶ 16. Here, the juvenile court expressly relied on Hannah's allegations of sexual abuse, and the opinions of two "very qualified therapists" that those allegations were credible, in stating its findings. There can be no serious question of whether a constitutional nexus exists in this case, where Emma and Hannah were members of the same household and the allegations arose during the course of this proceeding. *See id.* ¶ 19 (sufficient constitutional nexus to terminate father's rights to child born nine months after termination of his rights to other child where circumstances surrounding prior abuse persisted). To a large extent, Larry suggests we reweigh the evidence, which we will not do. *See Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶¶ 4, 14, 100 P.3d 943, 945, 947 (App. 2004) (juvenile court "in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts"). Reasonable evidence supports the court's finding

that Larry had abused a child, warranting termination pursuant to § 8-533(2). We will not disturb that determination.[5]

Best Interests

¶14 Larry also argues it is not in Emma's best interests to be adopted by his mother, Alta, with whom Emma and Hannah had been placed, and that there was "no evidence" Emma is otherwise adoptable. To establish that terminating Larry's parental rights is in his daughter's best interests, ADES was required to show Emma "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Id*. ¶ 6. But in making its determination on this issue, the juvenile court does not "weigh alternative placement possibilities to determine which might be better," *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 5, 982 P.2d 1290, 1291 (App. 1998); rather, the court's finding of best interests "is separate from and preliminary to its determination of placement after severance." *Antonio M. v. Ariz. Dep't of Econ. Sec.*, 222 Ariz. 369, ¶ 2, 214 P.3d 1010, 1011-12 (App. 2009).

¶15 Here, there was evidence Alta was willing to adopt Emma and had provided for her needs during her placement. *See Audra T.*, 194 Ariz. 376, ¶ 5, 982 P.2d at 1291 (court may consider "the immediate availability of an adoptive placement" or "whether an existing placement is meeting the needs of the child" in support of best interests finding). Moreover, although CPS case manager Kristen Olsen did not state specifically that Emma was adoptable, she responded affirmatively when asked if CPS

[5]In light of our conclusion with respect to this ground for termination, "we need not address claims pertaining to the other grounds" found by the juvenile court. *Jesus M.*, 203 Ariz. 278, ¶ 3, 53 P.3d at 205.

had "alternat[ive] resources to identify an adoptive home" for Emma if Alta did not adopt her. *See Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 19, 83 P.3d 43, 50 (App. 2004) (best interests established by showing "a current adoptive plan exists for the child, or even that the child is adoptable") (citation omitted). Thus, there was ample evidence to support the juvenile court's finding of best interests. *See Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d at 945 ("The existence of a current adoptive plan is one well-recognized example" of benefit sufficient to satisfy best interests requirement).

Disposition

¶16 We conclude reasonable evidence supported the juvenile court's finding that termination is warranted pursuant to § 8-533(B)(2), as well as its finding that termination is in Emma's best interests. We therefore affirm the court's order terminating Larry's parental rights.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge